

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

77-2046

Argued by

ANTHONY J. GIRESE

United States Court of Appeals
For the Second Circuit

TAYLOR DILLARD,

Petitioner-Appellant,

against

J. EDWIN LAVALEE,

Warden of the Clinton Correctional Facility, and

BENJAMIN WARD,

Commissioner of the New York State Department of
Correctional Services,

Respondents-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR
RESPONDENTS-APPELLEES

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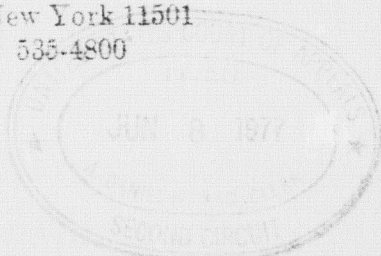


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Opinions Below	2
Statement of the Case	2
The Crime	2
The Sentence	3
State Appellate Proceedings	3
Statute Involved	4
Point—New York's Multiple Felony Offender Law is not violative of the equal protection clause	4
Conclusion	11

TABLE OF AUTHORITIES

Statutes and Constitutional Provisions:

New York Penal Law	
§1.05	8
§70.06	3, 4, 5
§70.10	10, 11
§160.10	1
N. Y. Vehicle and Traffic Law §1192(5)	3, 4, 8
28 U.S.C. 2241	1
United States Constitution	
8th amendment	6
14th amendment	3, 5, 7

	PAGE
Cases:	
Birnbaum v. Trussel, 371 F.2d 672 (2d Cir. 1966)	8
Eisenstadt v. Baird, 405 U.S. 438 (1971)	10
Furman v. Georgia, 408 U.S. 238 (1972)	8
McGinnis v. Royster, 410 U.S. 263 (1973)	6, 9
Marshall v. United States, 414 U.S. 417 (1974)	6, 9
People v. Dillard, 52 A.D.2d 893, 38 N.Y.S.2d 558 (2d Dept.), <i>lv. to appeal denied</i> 39 N.Y.2d 1062 (1976)	2, 3
People v. Tyler, 46 A.D.2d 997, 361 N.Y.S.2d 565 (4th Dept. 1974)	5
Peterson v. Gaughan, 404 F.2d 1375 (1st Cir. 1968)	6
Smith v. Follette, 445 F.2d 955 (2d Cir. 1971)	6
United States v. Beverly, 416 F.2d 263 (9th Cir. 1969)	7
United States v. Kerrigan, 514 F.2d 35 (9th Cir. 1975), <i>cert. denied</i> 423 U.S. 924 (1976)	8
United States v. Raines, 367 U.S. 17 (1960)	10
United States v. Thompson, 452 F.2d 1333 (D.C. Cir. 1971), <i>cert. denied</i> 405 U.S. 998 (1972)	6
United States ex rel. Mercogliano v. County Court of Nassau County, 414 F.Supp. 508 (E.D.N.Y.), <i>aff'd</i> <i>on opn. below</i> — F.2d — [2d Cir., docket no. 76-2064, Nov. 17, 1976]	6
United States ex rel. Sero v. Preiser, 377 F.Supp. 463 (S.D.N.Y.), <i>aff'd</i> 506 F.2d 1115 (2d Cir. 1974), <i>cert. denied</i> 421 U.S. 923 (1975)	6

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J. EDWIN LAVALEE,
Warden of the Clinton Correctional Facility, and
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Commissioner of the New York State Department of
Correctional Services,
Respondents-Appellees.

On Appeal from the United States District Court
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BRIEF FOR RESPONDENTS-APPELLEES

Preliminary Statement

Pursuant to a certificate of probable cause issued April 11, 1977, Taylor Dillard appeals from an order of the District Court for the Eastern District of New York (PRATT, J.), entered April 4, 1977, dismissing his petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241.

The State Judgment of Conviction

On February 3, 1975, Dillard was convicted, after a jury trial in the County Court of Nassau County (YOUNG, J.), of robbery in the first degree (N.Y. Penal Law §160.10), and sentenced¹ second felony offender, to a sentence of from four half to nine years' imprisonment.

Opinions Below

The opinion of the District Court dismissing the petition for a writ of habeas corpus is presently unreported (A1).*

The order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, affirming the conviction, appears in *People v. Dillard*, 52 A.D.2d 893, 38 N.Y.S.2d 558 (2d Dept. 1976), *lv. to appeal denied* 39 N.Y.2d 1062 (1976).

Statement of the Case

The Crime

In the small hours of the morning of May 14, 1974, Taylor Dillard entered a bar in Freeport, Long Island, and, at the point of a knife, obtained the day's receipts from the bar's sole occupant, barmaid Barbara Cockrell. Ms. Cockrell succeeded in escaping and ran to a nearby coffee shop, where an alarm was turned in. Employees of the coffee shop and responding police captured Dillard across the street from the bar. He still had the knife and the proceeds of the robbery.

* Numerical references preceded by an "A" are to petitioner-appellant's appendix.

The Sentence

Dillard was indicted, tried by jury, and convicted of robbery. On February 3, 1975, in the County Court of Nassau County (Young, J.), he was sentenced to a period of imprisonment of from four and one-half to nine years, as a second felony offender, pursuant to New York Penal Law §70.06. The prior offense, which mandated such a sentence, was a May, 1971 conviction of operating a motor vehicle in an intoxicated condition as a felony [New York Vehicle and Traffic Law §1192(5)].

State Appellate Proceedings

Dillard appealed his conviction to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. In that court, he claimed, *inter alia*, that his sentence was based, to his detriment, on a statutory scheme which makes irrational distinctions and was hence violative of the equal protection clause of the fourteenth amendment of the federal constitution. The Appellate Division affirmed the conviction without opinion. *People v. Dillard*, 52 A.D.2d 893, 38 N.Y.S.2d 558 (2d Dept. 1976). Leave to appeal to the New York Court of Appeals was subsequently denied by Judge JASEN, *People v. Dillard*, 39 N.Y.2d 1062 (1976).

Statute Involved

New York Penal Law §70.06,* in relevant part, reads as follows:

1. Definition of second felony offender:

(a) A second felony offender is a person who stands convicted of a felony defined in this chapter [*i.e.*, The Penal Law], other than a class A felony, after having previously been subjected to one or more predicate felony convictions as defined in paragraph (b) of this subdivision.

(b) For the purpose of determining whether a prior conviction is a predicate felony conviction, the following criteria shall apply:

(i) The conviction must have been in this state of a felony. * * *

POINT

New York's Multiple Felony Offender Law is not violative of the equal protection clause [answering the brief].

Pursuant to the mandate of New York Penal Law §70.06, Taylor Dillard was sentenced as a second felony offender. The predicate for the second felony offender sentence was a conviction in May, 1971, for operating a motor vehicle while in an intoxicated condition as a felony, pursuant to New York Vehicle and Traffic Law §1192(5) (A7).**

* The statute was amended, without affecting the instant claim, after petitioner's sentencing. See petitioner-appellant's brief, fn. at 15.

** As the District Court noted (A9), the Vehicle and Traffic Law defines driving while intoxicated as a misdemeanor if a first conviction, and as a felony upon subsequent convictions. Thus, a conviction for driving while intoxicated as a felony itself represents more than one conviction for this crime.

Dillard first notes that had he committed the robbery first and the driving while intoxicated felony second, he would not be adjudicated a second felony offender, because the Penal Law [§70.06(1)(a)] initially defines a second felony offender as "a person who stands convicted of a felony *defined in this chapter*" [i.e., the Penal Law] (emphasis supplied). By this language, the Legislature intended to limit the application of the second felony offender sentence to those whose second felony was one delineated in the Penal Law. *People v. Tyler*, 46 A.D.2d 997, 361 N.Y.S. 2d 565 (4th Dept. 1974). Since the driving while intoxicated felony is not defined in the Penal Law, a person whose second crime is such a felony is not eligible for second felony offender treatment. *Id.* On the other hand, the statutory definition of the first, or "predicate," felony [Penal Law §70.06(1)(b)(i): "The conviction must have been in this state of a felony * * *"] includes felonies defined outside the Penal Law. Therefore, as Dillard notes, under the extant statutory scheme a man who commits a robbery and then the driving while intoxicated felony is not a second felony offender, while a man who commits the driving while intoxicated felony and then a robbery (as did Dillard) is a second felony offender. Dillard claims that this distinction is irrational and therefore argues that the statute, as applied to the instant situation, is violative of the equal protection clause of the federal constitution. Dillard's argument, as the District Court noted, has "a simple, superficial appeal." However, upon close analysis, "The argument [is] not quite so appealing" (A3).

The threshold question is the selection of the applicable standard of review. In the courts of the State of New York,

both petitioner and respondent argued that the appropriate test is whether there is "some rational basis for the statutory distinctions made" pursuant to *Marshall v. United States*, 414 U.S. 417, 421 (1974).^{*} And, as petitioner recognizes, this was the standard applied in *United States ex rel. Mercogliano v. County Court of Nassau*, 414 F. Sup. 508 (E.D.N.Y.), *aff'd on opn. below*, — F.2d — [2d Cir., docket no. 76-2064, Nov. 17, 1976], a case which construed the instant statute in the context of a different equal protection challenge. See also *McGinnis v. Royster*, 410 U.S. 263 (1973); *United States ex rel. Sero v. Preiser*, 377 F. Supp. 463 (S.D.N.Y.), *aff'd* 506 F.2d 1115 (2d Cir. 1974), *cert. denied* 421 U.S. 923 (1974); *Smith v. Follette*, 445 F.2d 955 (2d Cir. 1971); *Peterson v. Gaughan*, 404 F.2d 1375 (1st Cir. 1968). However, in the District Court and now in this Court, appellant argues that the standard should be a "sliding-scale standard, requiring at least a substantial state interest" (appellant's brief at 13). That argument, which ignores all of the applicable precedent cited above, is predicated upon the theory that "deprivation of liberty" is a "fundamental right" within the meaning of cases like *United States v. Thompson*, 452 F.2d 1333 (D.C. Cir. 1971), *cert. denied* 405 U.S. 998 (1972), which applied such a standard in a case involving the right to bail pending appeal in the District of Columbia. However, what is at issue here is not the manner in which the state differentiates between two classes of people whom it proposes to initially imprison before final adjudication of guilt, a true "deprivation of liberty," but rather the manner in which the state sets, within the broad limits of the eighth amendment, the length

^{*} Copies of the relevant portions of the briefs of both sides in the Appellate Division of the Supreme Court of the State of New York will be supplied on request.

of imprisonment of those who are deprived of liberty by virtue of a criminal conviction. There is considerably less infringement upon the right to "liberty" of the citizenry in the latter case than in the former.

In any event, under any standard, the statute is constitutional. Dillard's argument, at the threshold, requires acceptance of the dubious proposition that those persons who commit a non-penal law felony and then a penal law felony, as opposed to offenders who do the reverse, constitute a "class" for equal protection purposes. Rather, as the District Court noted, once a person commits a felony, defined by any chapter of the consolidated laws of New York, the laws of the state put him on notice that his subsequent commission of a felony defined in the penal law chapter of the consolidated laws of New York will render him subject to punishment greater than that which he could normally be subject to for that second penal law felony alone. That New York has chosen that certain other combinations of felonies will not expose the offender to multiple felony offender treatment hardly deprives Dillard's group of offenders of the equal protection of the law. For, the state has extremely broad discretion to set whatever penalties it deems appropriate for all crimes; and, all offenders who commit the combination of felonies Dillard did are subject to the same penalty. As the Ninth Circuit noted in *United States v. Beverly*, 416 F.2d 263, 265 (9th Cir. 1969), "appellant also attacks the mandatory sentence [for mail robbery] as denying him equal protection of the laws since other crimes, which appellant regards as equally serious, do not carry such extreme penalties * * *. It is, however, for Congress and not the courts to determine the relative seriousness of different crimes and the relative need for de-

terrence * * *." See also *Furman v. Georgia*, 408 U.S. 238 (1972); *United States v. Kerrigan*, 514 F.2d 35 (9th Cir. 1975), *cert. denied* 423 U.S. 924 (1976); *Birnbaum v. Trus-sel*, 371 F.2d 672, 676 (2d Cir. 1966).

Further, even were we to view Dillard's group and the posited comparison group as a "class" for equal protection purposes, there are rational reasons for differentiating between the two groups. New York defines the bulk of New York's serious criminal offenses in its penal law. Effective in 1967, the first of the penal law's several purposes is "to proscribe conduct which unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests." Penal Law §1.05. Thus, the Penal Law enumerates all of the traditional serious criminal offenses, *i.e.*, assault (art. 120); homicide (art. 125); sex offenses (art. 130); kidnapping (art. 135); burglary (art. 140); arson (art. 150); larceny (art. 155); etc. As noted by Dillard (brief, pp. 16, 18), other criminal offenses exist elsewhere in the laws of New York. One such crime, the predicate offense at issue [Vehicle and Traffic Law §1192(5)] is embodied in that chapter of New York's consolidated laws which provide for the establishment of the Department of Motor Vehicles, and essentially enacts the rules of the road for the State of New York.

While driving while intoxicated is obviously a serious crime, since its commission is pregnant with danger to the general population, it cannot be gainsaid that it is not as directly anti-social in character as the traditional crimes defined by the Penal Law. Therefore, New York may validly decide that a man who commits the vehicular felony

after committing one of the more directly anti-social penal law offenses should *not* be treated as a second felony offender and severely punished. Contrariwise, New York may logically decide that a man who commits the vehicular felony first and the penal law felony second, thus demonstrating a serious ascending degree of anti-social behavior, should be more severely punished as a second felony offender. In short, New York could validly decide that non-penal law felonies are, in the main, egregious enough to serve as the predicate, but not as the subject offense for the purposes of invoking the second felony offender scheme. Thus, the chronological distinction between the two scenarios has a rational basis bearing "some relevance" to the purposes of invoking the second felony offender scheme. upheld. *Marshall v. United States, supra* at 417, 422. *McGinnis v. Royster, supra* at 276 (1972).

Indeed, an excellent illustration of the working of the chronological differentiation towards the effectuation of the statutory purpose appears in the facts now at issue. Dillard committed the vehicular felony in 1971. In 1974, he committed a knifepoint robbery, a felony for which he could have received a term of up to 25 years' imprisonment. It is incontestable, from the standpoint of law, equity, or common sense, that that robbery was a more serious crime than the vehicular felony. Thus, it is equally incontestable that Dillard was, after 1974, more deserving of second felony offender treatment than the man who commits a 1971 robbery and then a 1974 vehicular felony. Accordingly, Dillard's attempt to attack the constitutionality of the application of the statute in situations involving individuals who commit other predicate non-penal law and other subject

penal law offenses is without merit.* See *Eisenstadt v. Baird*, 405 U.S. 438, 444 (1971); *United States v. Raines*, 367 U.S. 17, 21 (1960); ["one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."']

Dillard, however, raises several further arguments purporting to establish the statute's lack of rationality. Apparently attempting to show legislative confusion, he claims that the instant statute lacks an "articulation of purpose." The clear intent of the plain words of the statute specifically differentiating between penal and non-penal law offenses refutes such a claim. He also notes that Penal Law §70.10, which provides for the treatment of persistent felony offenders [*i.e.*, those guilty of more than two predicate felonies] makes no differentiation between penal and non-penal law felonies, so that a non-penal law felony may be the first, second or third conviction for the purposes of that statute. However, that statute, unlike the second felony offender statute, does not mandate a persistent felony offender term of imprisonment (life imprisonment) upon a finding of two predicate felonies. Rather, in addition to finding the two predicate felonies, the court must also be "of the opinion that the history and character of the defendant and the nature and circumstances of his criminal

* That appellant, by thoroughly combing both the penal law and the other statutes of the state, is able to present some non-penal law offenses which appear to him to be as serious as some other penal law offenses (brief, pp. 16, 18), is not surprising. However, it does not change the fact that in the main, penal law offenses are, both in terms of punishment and character, more serious than non-penal law offenses.

conduct indicate that extended incarceration and life-time supervision will best serve the public interest." The Legislature thus certainly could choose to allow the sentencing judge the broadest possible discretion in examining felon's past criminal record to reach a reasoned judgment on the applicability of persistent felony offender treatment. Moreover, the Legislature could also certainly decide that three felonies of any nature (the two predicates plus the one being sentenced for) represent a course of conduct egregious enough to provide potentially for lengthened incarceration.

Conclusion

The order of the District Court should be affirmed.

Respectfully submitted,

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Affidavit of Service by Mail

In re:

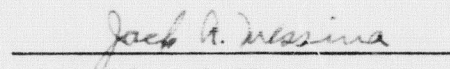
Dillard v LaValeeState of New York
County of New York, ss.:

Harry Minott

being duly sworn, deposes and says, that he is over 18 years of age.

That on JUN 8 - 1977, 1977, he served 3 copies of the
within Briefin the above-named matter on the following counsel by enclosing said
three copies in a securely sealed postpaid wrapper addressed as follows:Legal Aid Society of
Nassau County
400 County Seat Drive
Mineola, New York 11501

(Attorney for Petitioner-Appellant)

~~and depositing same in the official de-
pository under the exclusive care and
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Streets, New York, N. Y. 10013.Sworn to before me this 8th
day of June, 1977
JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1979

